(10)

Supreme Court, U.S.
FILED
JUL 18 2005
OFFICE OF THE CLERK

No. 04-1152

In The

Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL REFORM, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For the Third Circuit

Brief of *Amicus Curiae* The Claremont Institute
Center for Constitutional Jurisprudence
In Support of Petitioners

Edwin Meese III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

John C. Eastman
Counsel of Record
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

QUESTIONS PRESENTED

1. Does the Constitution require the Federal Government to subsidize a law school when it intentionally impedes military recruitment because the military is complying with a duly enacted federal statute, 10 U.S.C. § 654 [3] that the petitioners concede (at least for purposes of this litigation) is constitutional, when another statute [10 U.S.C. § 983(b)(1)], specifically compels withholding federal funds?

2. Does the Unconstitutional Conditions Doctrine bar a condition on federal spending that ensures that the federal spending program at issue—financial support for *local* institutions of higher education—is a necessary and proper means of furthering an enumerated power delegated to Congress?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. As Originally Conceived, Congress's Power to Spend for the General Welfare Was Limited to Spending for National, as Opposed to Merely Local or Regional, Concerns. 4

II. Federal Funding of Local Institutions of Higher Education Exceeds Congress' Power Under the General Welfare Provision of the Spending Clause Because It Supports Local, Not National, Interests. 9

III. Federal Funding of Higher Education, When Viewed In Conjunction With The Restrictions Imposed By The Solomon Amendment, Does Not Exceed Congress' Power To Raise and Support Armies. 12

IV. The Solomon Amendment's Restrictions on Educational Spending Do Not Violate the First Amendment. 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Brown v. *Board of Education*,
347 U.S. 483 (1954) 12

Cutter v. *Wilkenson*,
No. 03-9877, 125 S.Ct. 2113 (2005) 3, 9

Epperson v. *Arkansas*,
393 U.S. 97 (1968) 12

Forum for Academic and Institutional Rights v.
Rumsfeld, 390 F.3d 219 (CA3 2004) 13

Lichter v. *United States*,
334 U.S. 742 (1948) 13

Milliken v. *Bradley*,
418 U.S. 717 (1974) 12

Perry v. *Sindermann*,
408 U.S. 593 (1972) 14

Rust v. *Sullivan*,
500 U.S. 173 (1991) 14, 15

Sabri v. *United States*,
124 S.Ct. 1941, 1949-50 (2004) 9

Schaffer v. O'Neill,
534 U.S. 992 (2001) 3

Selective Draft Law Cases,
245 U.S. 366 (1918) 13

Solid Waste Agency of N. Cook Cty. v. *U.S. Army Corps*
of Eng'rs, 531 U.S. 159 (2001) 3

South Dakota v. *Dole*,
483 U.S. 203 (1936) 9

United States v. *American Library Association*, 539 U.S. 194, 211 (2003) 14

United States v. *Butler*, 297 U.S. 1 (1936) 5, 8, 9

United States v. *Lopez*, 514 U.S. 549 (1995) 12

United States v. *Morrison*, 529 U.S. 598 (2000) 3

United States v. *O'Brien*, 391 U.S. 367 (1968) 13

STATUTES AND CONSTITUTIONAL PROVISIONS

10 U.S.C. § 654[3] i

10 U.S.C. § 983(b)(1) ..... passim

Act of July 22, 1790, 1 Stat. 53, 54 ..... 10, 11

U.S. Const. Amend. I 15

U.S. Const. Art. I, § 8, cl. 1 ..... passim

U.S. Const. Art. I, § 8, cl. 12 ..... 3, 12

U.S. Const. Art. I, § 8, cl. 17 3

U.S. Const. Art. I, § 8, cl. 18 3

OTHER AUTHORITIES

2 *Annals of Congress*, House of Representatives, 1st Congress, 2nd Session 1686 (1790) 10

3 *Annals of Congress*, House of Representatives, 2nd Congress, 2nd Session 363, 397-98 (1792) 10

4 S. Journal 109 (1806) 11

45 S. Journal 361 (1854) 10

5 H. R. Journal 469 (1806) 11

Arnn, Larry P., and Jeffrey, Douglas A., *"We Pledge Allegiance"—American Christians and Patriotic Citizenship* 2

BENNETT, WILLIAM J., OUR SACRED HONOR (1997) 2

Buchanan, James, to House of Representatives (Feb. 24, 1859), in 5 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 3074, 3078 (James D. Richardson ed., 1897) 11

Buchanan, James, to House of Representatives (Feb. 24, 1859), in 5 MESSAGES AND PAPERS at 3078 11

Buchanan, James, Veto Message, 55 H.R. Journal 506 (Feb. 26, 1859) 7

Clause, Laurence, *"Uniform Throughout the United States": Limits on Taxing as Limits on Spending*, 18 CONST. COMMENT. 517, 540 (2001) 9

Eastman, John C., *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001) 2, 9

Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89 (2001) 4

Federalist 41, pp. 263-64 (Madison) (Rossiter, ed., 1961) 5

Hamilton, Alexander, Report on Manufactures, Dec. 5, 1791, *reprinted in* 2 FOUNDERS CONSTITUTION 446-47 (Philip B. Kurland & Ralph Lerner eds., 1987) 5

Jackson, Andrew, 28 H. R. Journal 29, 30 (1834) 10

Jackson, Andrew, Message Vetoing "An act to improve the navigation of the Wabash river," 50 H. R. Journal 27, 30 (1834) 10

Jackson, Andrew, Veto Message, 28 H. R. Journal 28 (1834) 6

JAFFA, HARRY V., CONDITIONS OF FREEDOM: ESSAYS IN POLITICAL PHILOSOPHY (1999) 2

JAFFA, HARRY V., EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS (1965) 2

JEFFERSON, THOMAS, WRITINGS 416, 529 (Merrill D. Peterson, ed., Library of America 1984) 11

Jefferson, Thomas, 5 H. R. Journal 469 (1806) 10

Jefferson, Thomas, Opinion on the Constitutionality of the National Bank, (Feb. 15, 1791), *reprinted in* THOMAS JEFFERSON, WRITINGS 416, 418 (Merrill D. Peterson, ed., Library of America 1984) 5

Jefferson, Thomas, to William Branch Giles (December 26, 1825), in WRITINGS at 1509-12 11

Madison, James, Debate on the Cod Fishery Bill, 3 *Annals of Congress*, House of Representatives, 2nd Congress, 1st Session 386-87 (1792) 5

Madison, James, Veto Message, 32 ANNALS OF CONG. 211 (1817) 6

Merrill, H. Kathryn, *The Encroachment of the Federal Government into Private Institutions of Higher Education*, 1994 B.Y.U. EDUC. & L.J. 63 (1994) 13

Monroe, James, Veto Message, 46 ANNALS OF CONG. 1838, 1849 (May 1822) 6

Natelson, Robert G., *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 49 (2003 9

PALM, DANIEL C., ED., ON FAITH AND FREE GOVERNMENT (1997) 2

Polk, James, 43 H. R. Journal 83 (1847) 10

Renz, Jeffrey T., *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article 1, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 127 (1999) 9

Sherman, Roger, Speech of July 17, 1787, *reprinted in* 2 MAX FARRAND, ED., THE RECORDS OF THE FEDERAL CONVENTION 21 (1911) 7

STORY, JOSEPH, COMMENTARIES ON THE CONSTITUTION § 919, p. 382-83 (1833) 5

Tyler, John, Veto Message, 39 H.R. Journal 1081 (June 11, 1844) 6

No. 04-1152

In The

Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

FORUM FOR ACADEMIC AND INSTITUT'L REFORM, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

Brief of *Amicus Curiae* The Claremont Institute
Center for Constitutional Jurisprudence
In Support of Petitioners

INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

American Founding to their rightful and preeminent authority in our national life," including the principles, at issue in this case, that the Spending Clause limits federal spending to matters of national or general concern as opposed to purely local concern. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. The Institute and its affiliated scholars have published a number of books and monographs of particular relevance here, including John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001); HARRY V. JAFFA, EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS (1965); HARRY V. JAFFA, CONDITIONS OF FREEDOM: ESSAYS IN POLITICAL PHILOSOPHY (1999); WILLIAM J. BENNETT, OUR SACRED HONOR (1997); and Larry P. Arnn and Douglas A. Jeffrey, "*We Pledge Allegiance*"—*American Christians and Patriotic Citizenship*; in DANIEL C. PALM, ED., ON FAITH AND FREE GOVERNMENT (1997).

The Claremont Institute Center for Constitutional Jurisprudence, which is the public interest law unit of the Institute, has participated as *amicus curiae* before this Court in several cases addressing similar issues, including *Cutter* v. *Wilkenson*, No. 03-9877, 125 S.Ct. 2113 (2005); *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Schaffer* v. *O'Neill*, 534 U.S. 992 (2001); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

SUMMARY OF ARGUMENT

Before addressing the validity of the Solomon Amendment itself, it is important to assess the source of federal authority for the underlying federal spending program to which the conditions of the Solomon Amendment is attached. The several pubic and private universities who have challenged the Solomon Amendment in this litigation all receive federal

funds in support of their educational efforts—funds conditioned on compliance with the Solomon Amendment The Constitution contains no enumerated power delegating to the federal government specific authority over education, of course, and federal funding for education does not fall within Congress's broad power under Article I, Section 8, clause 1, to tax and spend for the general welfare, properly understood, as the grants to particular local or state institutions are primarily for local, rather than national, benefit. Neither is the underlying federal spending program at issue here a valid exercise of Congress's near-plenary power over federal territory, *see* U.S. Const. Art. I, § 8, cl. 17 , as none of the institutions involved in this litigation are in the District of Columbia or other federal territories.

Rather, the most solid footing for federal financial grants to local institutions of higher education appears to be the power delegated to Congress in Article I, section 8 of the Constitution "to raise and support Armies," U.S. Const. Art. I, § 8, cl. 12, combined with the Article I, section 8 power afforded to Congress to adopt means that are both "necessary and proper" to effect the enumerated ends. U.S. Const. Art. I, § 8, cl. 18. While the breadth of federal spending on education may well press the limits of even these powers, at least some measure of federal spending for local institutions of higher learning is constitutional permissible when directly tied to Congress's efforts to raise and support Armies. The Solomon Amendment provides that necessary nexus; it would be odd, therefore, for the very condition which renders federal spending permissible to itself be unconstitutional. Further, it is well and correctly established that conditions on federal spending designed to insure compliance with the permissible ends of the federal spending program do not intrude upon constitutionally-protected speech and association rights.

ARGUMENT

I. As Originally Conceived, Congress's Power to Spend for the General Welfare Was Limited to Spending for National, as Opposed to Merely Local or Regional, Concerns.

Article I, Section 8, Clause 1 of the Constitution provides that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, Excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8, cl. 1. On its face, the clause allows Congress to levy taxes only for two purposes: 1) to pay the debts of the United States; and 2) to provide for the common defense and general welfare of the United States. Yet to the modern eye, those two purposes are so broad as to amount to no limitation at all. Indeed, the contemporary view is that the power to provide for the "general welfare" grants Congress the ability to spend for anything it views as beneficial in some way, even if beneficial only to a small segment of the population or to a single locale. *See, e.g.*, Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 93 (2001) ("It is hard to imagine a broader statement of the scope of Congress's powers" than the "common defence" and "general welfare" language of the Spending Clause).

Such was not the view of those who drafted and ratified the Constitution, nor the view which prevailed in the political branches of government for the first half century of our nation's history, nor the view which prevailed in this Court until after its New Deal-era decision in *United States* v. *Butler*, 297 U.S. 1 (1936). James Madison and Thomas Jefferson held the limited view that the power to spend for the "general welfare" only authorized Congress to spend to further the other powers enumerated in Article I, Section 8. *See, e.g.*, Federalist 41, pp. 263-64 (Madison) (Rossiter, ed., 1961);

James Madison, Debate on the Cod Fishery Bill, 3 *Annals of Congress*, House of Representatives, 2nd Congress, 1st Session 386-87 (1792); Thomas Jefferson, Opinion on the Constitutionality of the National Bank, (Feb. 15, 1791), *reprinted in* THOMAS JEFFERSON, WRITINGS 416, 418 (Merrill D. Peterson, ed., Library of America 1984). Alexander Hamilton viewed the clause more expansively, but still believed it only authorized spending for the national welfare rather than local welfare. Alexander Hamilton, Report on Manufactures, Dec. 5, 1791, *reprinted in* 2 FOUNDERS CONSTITUTION 446-47 (Philip B. Kurland & Ralph Lerner eds., 1987). Justice Story agreed with Madison and Hamilton on this limitation on the Spending Clause, saying that "[a] power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power...[I]f the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the constitution." Joseph Story, COMMENTARIES ON THE CONSTITUTION § 919, p. 382-83 (1833).

From 1800 to 1860, almost every President adhered to the view that the Spending Clause was limited, either by its own text or by the enumeration of powers which followed. In the closing days of his second term as President, for example, Madison vetoed an internal improvements bill that would have funded the construction of roads and canals "in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defence." President James Madison, Veto Message, 32 ANNALS OF CONG. 211 (1817). Madison rejected the contention that the Spending Clause authorized such expenditures, stating that such a broad reading would render "the special and careful enumeration of powers, which follow the clause, nugatory and improper." *Id.*, at 212. President James Monroe vetoed as unconstitutional a bill to preserve and repair the Cumberland road, noting in his veto message that Congress's

power to spend was restricted "to purposes of common defence, and of general, national, not local, or state, benefit." President James Monroe, Veto Message, 46 ANNALS OF CONG. 1838, 1849 (May 1822). President Andrew Jackson vetoed as unconstitutional an effort by Congress to improve navigation of the Wabash River. He conceded that the improvements in the navigable portions of the river qualified as in the "general" or national welfare, but he deemed improvements above the point of navigability to be an unconstitutional appropriation for local improvements rather than improvements in the general welfare. President Andrew Jackson, Veto Message, 28 H. R. Journal 28 (1834).

Presidents Tyler, Polk and Buchanan likewise vetoed internal improvements bills as an unconstitutional exercise of Congress's power under the Spending Clause. *See, e.g.*, President John Tyler, Veto Message, 39 H.R. Journal 1081 (June 11, 1844). President Buchanan took it as a given that the funds raised by Congress from taxation were "confined to the execution of the enumerated powers delegated to Congress." The idea that the resources of the federal government—either taxes or the public lands—could be diverted to carry into effect any measure of state domestic policy that Congress saw fit to support "would be to confer upon Congress a vast and irresponsible authority, utterly at war with the well-known jealousy of Federal power which prevailed at the formation of the Constitution." "The natural intendment" of those who drafted and ratified the Constitution, he continued,

> would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers. If not, a Government has been created with all its other powers carefully limited, but without any limitation with respect to the public lands.

President James Buchanan, Veto Message, 55 H.R. Journal 506 (Feb. 26, 1859).

In addition to the views taken by the Founders and the early Presidents, strong evidence for interpreting the Spending Clause as being limited to the general rather than local welfare comes from the structure of the enumerated powers outlined in the Constitution. The enumerated powers given to Congress in the rest of Article I, Section 8 were themselves limited to matters that required national rather than local legislation. For example, early in the constitutional convention, Roger Sherman proposed that Congress should have power to legislate "in all cases which may concern the common interests of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned." Roger Sherman, Speech of July 17, 1787, *reprinted in* 2 MAX FARRAND, ED., THE RECORDS OF THE FEDERAL CONVENTION 21 (1911) (emphasis added); *see also id.* (proposal of Gunning Bedford) (giving to Congress the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent"). His proposal, and others like it, were referred to the Committee of Detail, which on August 6, 1787 gave substance to his proposal by reporting back a list of enumerated powers that was eventually to become Article I, Section 8—powers designed to further the common interests or general welfare of the nation without interfering unnecessarily with the internal police powers of the states. Thus, the limitations implicit in the very idea of the enumerated powers doctrine paralleled the "general welfare" limitation in the spending clause.

This Court has also at times recognized that the Spending Clause is limited to the general rather than local welfare. In *Butler*, this Court held that "[w]hile . . . the power to tax is

not unlimited, its confines are set in the clause which confers it, and not in those of Section 8 which bestow and define the legislative powers of the Congress." *Butler*, 297 U.S., at 65-66. Though the Court rejected the long-standing Madisonian position that the power to spend for the "general welfare" only authorized Congress to spend to further the other enumerated powers, the Court nevertheless concluded that the "general welfare" clause imposed another limitation on Congress' spending power, namely, that the purpose of the spending "must be 'general, and not local.'" *Id.*, at 66-67; *see also id.*, at 87 (Stone, J., dissenting) ("The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national"). The Court then invalidated the Agricultural Adjustment Act as exceeding that textual limit. *Id.*, at 68.

In recent years, members of the Court have recognized the limits on the Spending Clause, as originally conceived. In her dissent in *South Dakota* v. *Dole*, for example, Justice O'Connor warned that "[i]f the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'" 483 U.S. 203, 217 (1936) (O'Connor, J., dissenting) (quoting *Butler*, 297 U.S., at 78). Justice O'Connor emphasized that this "was not the Framers' plan and it is not the meaning of the Spending Clause." *Id.*

In two recent concurrences, Justice Thomas has also acknowledged the possibility that various pieces of federal legislation may exceed the Spending Clause. *See Sabri* v. *United States*, 124 S.Ct. 1941, 1949-50 (2004) (Thomas, J., concurring); *Cutter* v. *Wilkinson*, 125 S.Ct. 2113, 2125 n. 2, 2127 (Thomas, J., concurring). Justices O'Connor and Thomas are correct: As originally understood, the Spending

Clause is limited to spending that benefits national rather than local interests. *See also, e.g.*, Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 49 (2003) ("[T]he goal of the General Welfare Clause was to limit all congressional taxation and spending to general interest, as opposed to local or special interest, purposes."); Laurence Clause, *"Uniform Throughout the United States": Limits on Taxing as Limits on Spending*, 18 CONST. COMMENT. 517, 540 (2001) ("The 'general Welfare,' for promotion of which the Constitution was created, is the welfare of the whole United States. It is not an abstraction that authorizes any spending which benefits anyone within the United States."); Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article 1, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 127 (1999) ("Congress can tax for national, but not for local, purposes."); *see generally* John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 Chap. L. Rev. 63 (2001).

II. Federal Funding of Local Institutions of Higher Education Exceeds Congress' Power Under the General Welfare Provision of the Spending Clause Because It Supports Local, Not National, Interests.

Federal funding of higher education at local institutions, standing alone, is clearly unconstitutional under the original understanding of the Spending Clause. Such institutions of higher education primarily benefit local, not national, interests.

To draw the line between spending programs that are for the general welfare and those that are for the local welfare, one can look to the views of the founders and our earliest Presidents regarding which programs they believed would

violate the Spending Clause. Most of the rejected programs dealt with internal improvements to the states, whether they were to roads, rivers, harbors or canals. *See, e.g.*, President Thomas Jefferson, 5 H. R. Journal 469 (1806) (Jefferson on roads, rivers and canals); Act of July 22, 1790, 1 Stat. 53, 54 (Congress on rivers); President Andrew Jackson, 28 H. R. Journal 29, 30 (1834) (Jackson on roads); President James Polk, 43 H. R. Journal 83 (1847) (Polk on harbors and rivers). However, harbor improvements on the seaward side of ports of entry were found to be acceptable as they benefited the entire coastal trade. *See, e.g.*, President Andrew Jackson, Message Vetoing "An act to improve the navigation of the Wabash river," 50 H. R. Journal 27, 30 (1834). Loans and stock purchases for private companies were rejected, while refunds of commercial duties were allowed. *See, e.g.*, 2 *Annals of Congress*, House of Representatives, 1st Congress, 2nd Session 1686 (1790) (Congress on loans); President Andrew Jackson, 28 H. R. Journal 29, 30 (1834) (Jackson on stock purchases); 3 *Annals of Congress*, House of Representatives, 2nd Congress, 2nd Session 363, 397-98 (1792) (Congress on refunds of duties). Grants of land for insane asylums and agricultural colleges were also rejected as being unconstitutional. *See, e.g.*, 45 S. Journal 361 (1854) (President Franklin Pierce on insane asylums); President James Buchanan to House of Representatives (Feb. 24, 1859), in 5 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 3074, 3078 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS] (Buchanan on agricultural colleges). The line must be between spending that primarily benefits the nation as a whole, versus spending that primarily benefits local interests (and perhaps collaterally benefits national interests as well). Dredging a river in Georgia above the point of navigability primarily benefits the people of the State of Georgia, while erecting lighthouses on coastal waterways broadly benefits the entire national intercoastal trade. Act of July 22, 1790, 1 Stat. 53, 54.

In this case, the Court must determine whether federal spending on institutes of higher education primarily benefits national or local interests. A look to history shows that the original understanding of the Spending Clause did not view such spending as being for the general welfare. In 1806, President Jefferson proposed an amendment to the Constitution that would allow Congress to spend its surplus for "the great purposes of the public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of the federal powers." THOMAS JEFFERSON, WRITINGS 416, 529 (Merrill D. Peterson, ed., Library of America 1984) [hereinafter WRITINGS]; 5 H. R. Journal 469 (1806); see also 4 S. Journal 109 (1806). He felt that such an amendment was necessary "because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public monies to be applied." Jefferson to William Branch Giles (December 26, 1825), in WRITINGS at 1509-12. In 1859, President Buchanan vetoed as unconstitutional an act donating public lands to the several states for the establishment of agricultural colleges. President James Buchanan to House of Representatives (Feb. 24, 1859), in 5 MESSAGES AND PAPERS at 3078.

In addition to this historical evidence that spending on local institutions of higher education violates the Spending Clause by primarily benefiting local interests, contemporary cases continue to emphasize the local nature of education. In *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954), this Court recognized that "education is perhaps the most important function of state and local governments." This view has been reinforced in the decades since that case was decided. *See, e.g.*, *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."); *Milliken* v. *Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control

over the operation of schools."); *United States* v. *Lopez*, 514 U.S. 549, 564 (1995) ("[E]ducation [is an area] where States historically have been sovereign."). Typically, educational institutions take local residents and train them to return and enter the local workforce. Even if Congress were to fund institutions in every state, this aggregation of several local benefits would still not be funding for the general, national welfare.

III. Federal Funding of Higher Education, When Viewed In Conjunction With The Restrictions Imposed By The Solomon Amendment, Does Not Exceed Congress' Power To Raise and Support Armies.

An examination of the original understanding of the Spending Clause shows that the clause does not authorize Congress to provide federal funding to local institutions of higher education. However, such funding may still be authorized under some other power granted to Congress in the Constitution. When funding of higher education is restricted by the Solomon Amendment to institutions allowing military recruiters on campus, this overall program—or at least parts of it—is permissible under Congress' power to raise and support armies. U.S. Const. Art. I, § 8, cl. 12.

"The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) (citing *Lichter* v. *United States*, 334 U.S. 742, 755-758 (1948); *Selective Draft Law Cases*, 245 U.S. 366 (1918)). And as the Court of Appeals presumed, "the United States has a vital interest in having a system for acquiring talented military lawyers." *Forum for Academic and Institutional Rights* v. *Rumsfeld*, 390 F.3d 219, 245 (3d Cir. 2004) ("F.A.I.R."). The national interest in educating prospective soldiers has long been a motivating factor in federal funding of education. Historically, the first federal funding of private institutions of higher education came through government sponsorship of military officer training programs at private schools during World War I and World War II. It was only after this inroad that peacetime funding of private institutions began. *See* H. Kathryn Merrill, *The Encroachment of the Federal Government into Private Institutions of Higher Education*, 1994 B.Y.U. EDUC. & L.J. 63, 64-65 (1994).

For this purpose of educating future soldiers to be carried out successfully, the government must have the ability to recruit the students whose education is being subsidized. In this context, the Solomon Amendment is not a separate restriction or penalty imposed on a broader funding program, but instead is a tool to condition spending for the purposes for which it was authorized. The Amendment makes sure that these federal programs funding higher education really do go to help raise and support armies. This is why Judge Aldisert was right in his dissent to say that the Solomon Amendment was "not only authorized..., but commanded by" Congress' power to raise and support armies. *F.A.I.R.*, 390 F.3d, at 250 (Aldisert, J., dissenting).

IV. The Solomon Amendment's Restrictions on Educational Spending Do Not Violate the First Amendment.

Once the Solomon Amendment is seen as a necessary component of ensuring that federal funding of higher education goes to support the military, it becomes clear that it is part of a larger spending program rather than a separate imposition of a penalty. As part of a selective spending program, the unconstitutional conditions doctrine does not apply, because through the Solomon Amendment, Congress "is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they

were authorized." *Rust* v. *Sullivan*, 500 U.S. 173, 196 (1991).

The unconstitutional conditions doctrine provides that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). However, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. In *Rust*, Congress appropriated funding for family planning services and prohibited any of the funding from being used in programs providing abortion counseling. In *United States* v. *American Library Association*, 539 U.S. 194, 211 (2003), Congress providing funding to libraries but only to those that agreed to block obscene Internet sites. In such cases, the unconstitutional conditions doctrine does not apply because "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust*, 500 U.S. at 196. The key, then, is determining whether the Solomon Amendment is a component of the funding programs that was put in place to ensure that the money was spent for the authorized purposes, or whether it is a separate denial of a benefit or imposition of a penalty that takes away funds from some recipients for reasons unconnected with the Government's purposes for providing the funding.

Federal funding of local institutions of higher education is arguably a necessary and proper means of giving effect to Congress' power to raise and support armies. The Solomon Amendment, by permitting funding only to those institutions that allow military recruiters on campus, serves to ensure that the federal money is really going to help educate potential soldiers. As such, the Amendment is not imposing a penalty but is "instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust*, 500

U.S. at 196 (1991). Thus the Solomon Amendment does not violate the First Amendment.

CONCLUSION

The decision of the Third Circuit should be reversed.

Respectfully submitted,

Edwin Meese III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

John C. Eastman
Counsel of Record
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence